APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INCORPORATED,
Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent,

New England Electric System Bay State Gas Company,
Intervenors.

No. 74-1325.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 27, 1975.

Decided July 24, 1975.

RIVES, *Senior Circuit Judge:*

Without a hearing, the Securities and Exchange Commission (Hereafter referred to as "Commission") approved the final step in compliance with its order requiring the New England Electric System ("NEES")—a statutory holding company under the Public Utilities Holding Company Act of 1935 (15 U.S.C. § 79) (hereinafter the Act)—to divest itself of all ownership in gas utility companies. The Association of Massachusetts Consumers, Inc. ("AMC"), an intervenor in the proceedings before the Commission, challenges the actions of the Commission. We find that the Commission did not abuse its discretion and affirm its disposition of this case.

The controversy culminating in the present proceeding began over 18 years ago. In 1957, NEES held stock in a number of electric and gas utility companies serving New England. In that year, the Commission began proceedings,

under section 11 of the Act (15 U.S.C. § 79k), against NEES. The following year the Commission declared NEES' electric utility holdings to be an integrated system. (See § 2 of the Act, 15 U.S.C. § 79b). Six years later, the Commission ordered NEES to divest itself of the gas utility stock.[1] In 1968, after protracted litigation, the Supreme Court and the First Circuit affirmed the order.[2] In December, 1971, with approval of the Commission, NEES sold its stock in four of the gas utilities.[3] The following year NEES sought Commission approval of a plan to sell to the Boston Gas Company, an operating subsidiary of the Eastern Gas System, the assets of three utilities (plus another company related to those utilities), whose corporate shells would therafter be dissolved. In a separate application, NEES also proposed to sell to Springfield Gas Light Company its Lawrence Gas Company stock.[4] The plan required minority shareholders, whose holdings totaled 10% of the stock, to sell their stock to Springfield at the same price received by NEES. Springfield would then merge into its subsidiary, the Northampton Gas Light Company. The

---

[1] NEES transferred its stock to a subsidiary, the Massachusetts Gas System. The latter held the stock until the divestment could be completed.

[2] See New England Electric System, 41 SEC 888 (1964), affirmed initially, SEC v. New England Electric System, 384 U.S. 176, 86 S.Ct. 1397, 16 L.Ed.2d 456 (1966), reversing, 346 F.2d 399 (1st Cir. 1965), affirmed on second appeal, SEC v. New England Electric System, 390 U.S. 207, 88 S.Ct. 916, 19 L.Ed.2d 1042 (1968), reversing, 376 F.2d 107 (1st Cir. 1967). See also Holding Company Act Release No. 16618, Feb. 24, 1970 (App. 107-108).

[3] Central Massachusetts Gas Co., Norwood Gas Co., Wachusett Gas Co. and Northampton Gas Co.

[4] Although the two proposed sales were to be made to different purchasers, bids were solicited by copies of the same letter. There was no difference in the bidding procedure in the two cases. The sales became separate proceedings after NEES had determined the highest bidders.

surviving company would change its name to Bay State Gas Company, and would hold all of the Lawrence stock.

Two petitions to intervene in the proceedings were filed by AMC—(1) in the Eastern proceedings to ratify the sale of the assets of the three utilities to Boston Gas, and (2) in the Bay State proceedings to ratify the sale of the Lawrence stock to Bay State. AMC moved that the Commission consolidate the proceedings and conduct a hearing. The Commission did not act upon AMC's motion, but it did allow AMC limited participation in the Eastern proceedings. Following the hearings in those proceedings, a settlement among the parties was reached, and the Commission approved the sale to Boston Gas. At about the same time, the Massachusetts Public Utility Commission held a public hearing on the proposed sale of the Lawrence stock to Springfield and the merger of Springfield into Northampton to form Bay State. The record of those hearings reveals no participation by AMC. The Massachusetts Commission approved the plan. On October 31, 1973, the Commission issued a memorandum opinion approving the sale of the Lawrence stock to Springfield and denying AMC's motion. The Commission denied AMC's request for reconsideration. AMC appeals to this Court, pursuant to § 24(a) of the Act (15 U.S.C. § 79x(a)).

The question before this Court is whether the Commission abused its discretion in refusing to consolidate these proceedings with the Eastern proceedings and in denying a hearing on the original motion or on the motion for reconsideration.

[1-3] The law is clear concerning judicial review of an administrative body's refusal to consolidate two proceedings.

> "No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems of calendar administration confront an agency whenever related applications

> are pending at the same time. Consolidation * * * and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts."

City of San Antonio v. C. A. B., 126 U.S.App.D.C. 112, 374 F.2d 326, 329 (1967) (footnotes omitted). Consolidation would have needlessly delayed resolution of the Eastern proceedings. The failure to consolidate prejudiced none of AMC's rights in either proceeding. The Commission's refusal to consolidate the proceedings was a sound exercise of necessary discretion.

[4] On appeal, AMC submits that, contrary to the Commission's determination, three issues required a hearing:

> (1) the possible anti-competitive effects of the sale of Lawrence to a member of the "Tenney" group;
>
> (2) the possible application of sections 9(a)(2) and 10 [15 U.S.C. § 79i(a)(2) and § 79j] to the sale of Lawrence to Springfield;
>
> (3) the possible violation of the statute by NEES's submission of a voluntary plan for divestiture more than two years after the divestiture order became effective.

AMC must show more than that these were issues which the Commission could have considered. In addition, AMC must show that it presented them in compliance with the Commission's procedural rules. Rule 9 of the Commission's Rules of Practice, 17 CFR 201.9, requires that an intervenor state specifically the issues whose resolution requires a hearing. The published notice in the instant case called AMC's attention to that requirement. By timely motion, NEES complained that AMC was not in compliance with Rule 9.

AMC's compliance with the published notice was incomplete. It ignored NEES's motion, even though AMC's motion to intervene was vague as to the issues to be raised at any hearing. It did mention NEES's long delay in disposing of its gas utility stock and expressed suspicion about the fairness of the procedure by which NEES sought bids for the stock. In a letter, copy of which was appended to the motion, the president of AMC stated that the instant application raised "*many of the same objections* * * * raised against the proposed sale [in the Eastern proceedings]" (Emphasis supplied) (App. 156). Those three statements gave the only definition of the issues which AMC desired to explore in a hearing. AMC did not state that the Commission ignored any anti-competitive effects from the sale to Springfield,[5] nor did it argue that section 9(a)(2) governed this sale. It was only after the sale had been approved and on a petition for rehearing that AMC introduced those two issues.

The requirement that the intervenors specify the issues which demand a hearing serves important purposes. It enables the Commission to screen out frivolous requests for hearings and efficiently conduct hearings. Here, where the subject matter is so complex, poorly framed issues could turn the hearings into a maze in which justice could be lost. The strict application of those procedural rules seems appropriate here, where the intervenors were clearly on notice that they must comply with Rule 9. Nevertheless, since the intervenors argued that they represent important

---

[5] It is true that in the Eastern proceedings AMC objected to the purchaser and stated that the Bay State sale was subject to "many of the same objections." Since any potential anticompetitive effects from the sale to the particular buyer stemmed from facts peculiar to each case, the Commission could not have surmised that, though the circumstances of the buyer in each case were entirely different, AMC wanted to transfer this particular objection from the Eastern proceedings to the Bay State proceedings. The reasonable interpretation was to the contrary.

public interests, out of an abundance of caution we construe their pleadings so as to protect those interests and consider all issues referred to in their original petition. We follow the same course in reviewing the issues mentioned in AMC's petition for reconsideration.

[5, 6] After showing that reference was made to an issue in its original petition for a hearing, AMC must show that the resolution of the issue required a hearing and that the denial by the Commission was an abuse of discretion. AMC bears an even heavier burden as to the issues first raised in its petition for reconsideration. Only a clear abuse of discretion warrants reversal for failure to grant a request for a rehearing. See United States v. Pierce Auto Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821 (1946); United States v. I. C. C., 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970). At the very least, the latter standard requires AMC to show that a potential issue was present and the hearing would have helped resolve it.

[7] An issue mentioned in the original petition was whether the Commission erred in allowing NEES to submit a voluntary plan for divestiture five years after the divestiture order became effective. AMC submits that, under section 11(c) [15 U.S.C. § 79k(c)], a holding company has no more than two years in which to comply with a divestiture order. AMC asks that the Commission's approval of the sale be vacated and that the Commission be directed to proceed pursuant to section 11(d) [15 U.S.C. § 79k(d)]. Phillips v. Securities and Exchange Commission, 87 U.S.App.D.C. 380, 185 F.2d 746, 750 (1950) speaks to this question.

> "Sections 11(c) and 11(d) were designed to enable the Commission to deal with a recalcitrant company. But Congress could hardly have intended that an order entered by the Commission should become a trap closing down relentlessly at the end of a two-year period, against the judgment of the Commission, con-

trary to the provisions of the order entered, and to the damage of the very interests which Congress was endeavoring to protect—the public interest and that of investors. To give any such interpretation to the statute might well tend to cause the Commission to refrain from issuing any order in a particular case until the situation became ripe for complete and immediate enforcement."

Although NEES was slow in complying, within the two years it did make some progress by creating a subsidiary, the Massachusetts Gas System, to hold the gas utility stock. That progress and the Commission's satisfaction with the final plan are enough to satisfy the requirements of the Act.

[8-10] Another issue mentioned in the original petition was whether NEES maintained competitive conditions in soliciting bids for the stock. On appeal, AMC challenges the propriety of transferring the Commission's findings on that issue from the Eastern proceedings to the present one. We think that use proper. Since NEES solicited bids for all the utilities as a part of the same transaction, the circumstances of soliciting both bids were identical. Furthermore, AMC was not denied an opportunity to shape the record, for it participated in the hearing in the Eastern proceedings. The only complaint that AMC can make is that it would have tried harder in the Eastern hearing if it had known that that would be the only hearing. The Commission need not hold a hearing to gain information which has already been gathered. An administrative body may "mold its procedures to the exigencies of the particular case," Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 762, 93 S.Ct. 1870, 1880, 36 L.Ed.2d 635 (1973). Moreover, "[T]he mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." United States v. Pierce Auto Freight Lines, Inc.,

327 U.S. 515, 530, 66 S.Ct. 687, 695, 90 L.Ed. 821 (1946). AMC fails to show why the findings in the Eastern proceedings were wrong, or that the use of those findings was prejudicial. The findings were supported by substantial evidence and, clearly, there was no abuse of discretion.

[11] An issue which AMC raised for the first time in its petition for reconsideration was whether the sale would have anticompetitive effects. AMC contends that Springfield, the purchaser, belongs to an interstate group of gas and electric utilities known as the "Tenney" group. Those utilities have the same chief executive officer—a Mr. Tenney—and have in common several Board of Director members and officers. The Tenney family owns between 5 and 15% of the stock in each company. Although AMC concedes that the "Tenney" group does not fit within the statutory definition of a holding company, it argues that the Public Utilities Holding Company Act requires the Commission to ensure that any divestment will promote the objectives of the Act. In short, AMC asks this Court to hold that, even though the Commission could not order the "Tenney" group to sell the Lawrence stock—if any were owned, it must forbid the group to buy any of the Lawrence stock. We find it unnecessary to resolve that issue. To prevail at a hearing on the matter, AMC would have to show that, although the "Tenney" group was not a statutory holding company,[6] it was a source of the same abuses and vices which led the Congress to enact the Public Utilities Holding Company Act. See § 1, 15 U.S.C. § 79a. Elimination of common officers and directors in noncompeting utility companies was not the precise purpose of the Act. AMC makes no allegation that the "Tenney" group is the source of any evils set forth in section 1 of the Act (15 U.S.C. § 79a). AMC having failed to show that there would have been substantial issues raised at the hearing—

---

[6] See the definition of holding company in section 2 of the Act, 15 U.S.C. § 79b.

even if its interpretation of the Act were correct (a question we do not reach), we find that the Commission did not abuse its discretion in refusing to vacate its approval of the sale.

[12, 13] The remaining issue raised in the petition for reconsideration was whether this transaction fell within the ambit of section 9(a)(2) of the Act [15 U.S.C. § 79i(a)(2)] and, hence, required Commission approval (see § 10 of the Act, 15 U.S.C. § 79j). Since Springfield merged into Northampton after it had bought the Lawrence stock, for an instant there were three entities—Northampton, Lawrence and Springfield. Thus, AMC argues that Springfield, which was already an affiliate of Northampton, was buying the stock of a utility company. Section 9(a)(2) forbids such a purchase without Commission approval. The Commission concluded that the merger of Springfield into Northampton was so closely related to the sale that the transaction should be viewed as one in which Northampton, a company without an affiliate, obtained the Lawrence stock. We find the Commission's reasoning persuasive. In assessing interrelated corporate adjustments, comparison should be made of the situation just prior to and immediately following the adjustments. The sequence of relatively simultaneous corporate adjustments whose order has no practical effect do not govern the applicability of section 9(a)(2). The same result would not obtain where the sequence of corporate adjustments had a harmful effect on investors or the public.

Finding no reversible error, we affirm the judgment of the Commission.

Affirmed.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

Release No. 18149/October 31, 1973

Admin. Proc. File No. 3-4053

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS GAS SYSTEM
Westborough, Massachusetts

(54-248)

(70-5275)

MEMORANDUM OPINION APPROVING SECTION 11(e) PLAN

This proceeding relates to a plan of New England Electric System ("NEES"), a registered holding company, and its subsidiary holding company, Massachusetts Gas System ("Mass Gas"), filed pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("Act") and other applicable provisions and rules thereunder, including Section 12(d) and Rule 44. The plan proposes that NEES sell its capital stock interest in the Lawrence Gas Company ("Lawrence"), a subsidiary company, to Springfield Gas Light Company ("Springfield"), an exempt holding company under the Act pursuant to Rule 2 thereunder.[1] It also provides for the liquidation of Mass Gas and the elimination of the minority shareholder interest in Lawrence.

A notice of the filing was issued,[2] and the Association of Massachusetts Consumers ("AMC"), a non-profit organization, requested that a hearing be held. It also requested that we consolidate this hearing with the hearing which we ordered at the request of AMC and others on the Section

---

[1] See, *New England Electric System*, 41 S.E.C. 888 (1964), affirmed *SEC* v. *New England Electric System*, 390 U.S. 207 (1968).

[2] Holding Company Act Release No. 17906 (March 14, 1973).

11(e) plan of NEES proposing to sell its stock interests in its other gas subsidiaries.[3] Subsequently, the controversy as to the latter plan was settled, and AMC and the other parties to the settlement have withdrawn from the proceeding.[4] AMC gave no reasons to support its request for hearing, as directed by our notice. The record is sufficient to render a decision in this proceeding without a hearing. The request for such hearing is hereby denied.

Under the plan, Mass Gas, which is to be liquidated, will transfer to NEES its holdings of 90.42% of the capital stock of Lawrence. NEES will then sell the Lawrence stock to Springfield, a Massachusetts Gas utility,[5] for $6,638,000 in cash. Concurrently with the Lawrence acquisition Springfield will be merged into Bay State Gas Company ("Bay State"), presently a Springfield subsidiary company, and Lawrence will be retained by Bay State as a subsidiary company.[6] Bay State proposes to claim an exemption as a holding company under Rule 2 of the Act. The minority shareholders of Lawrence will be paid the same price per share as that paid to NEES.

Lawrence is a gas utility company which supplies gas service to over 30,000 customers in four communities in northeast Massachusetts, with an estimated population of 140,700. In 1972 Lawrence had a net operating income of $977,858, net income of $462,865, and net utility plant of $14,767,993. Gas sales by Lawrence totaled 4,353,298 Mcf for that year. Lawrence has outstanding 188,000 shares of common stock, of which 170,002, is owned indirectly by

---

[3] Holding Company Act Release No. 17908 (March 16, 1973).

[4] Holding Company Act Release No. 18133 (October 25, 1973).

[5] The acquisition of the Lawrence stock was approved by the Massachusetts Department of Public Utilities in D.P.U. 17726, dated October 10, 1973.

[6] As a result of the concurrent merger, Lawrence will be Bay State's sole statutory affiliate. The proposed acquisition is therefore not subject to Sections 9(a) (2) or 10 of the Act.

NEES through Mass Gas. The balance of 17,998 is publicly held. Lawrence's pipeline natural gas is supplied by Tennessee Gas Pipeline Company, which also supplied Springfield.

We find, as required by Section 11(e), that the plan is necessary to comply with Section 11(b). Our order thereunder directed NEES to divest its interests in its gas utility companies, including Lawrence, and the sale of Lawrence does that. The retirement of the minority shares of Lawrence, as we have held in other cases,[7] is required under Section 11(b)(2).

We also find under Section 11(e) that the plan is "fair and equitable" to NEES and the minority shareholders of Lawrence. The highest bid received by NEES was the one from Springfield, in the amount of $6,638,000, plus or minus a dollar for dollar adjustment by the amount of any increase or decrease in the underlying book value of the shares between December 31, 1971, of the Lawrence shares to be sold by NEES.[8] The minority shareholders will receive the same premium as NEES. This premium over book value compares very favorably when tested against the sales of securities of similar companies. The per share price to be paid is 14.82 and 13.96 times Lawrence's earnings for the years 1972 and 1971, respectively.

The sale of the Lawrence stock is also subject to Section 12(d) of the Act and Rule 44 promulgated thereunder, including the requirement that competitive conditions shall be maintained with respect to the sale.[9] NEES solicited ex-

---

[7] *Northeast Utilities*, Holding Company Act Release No. 15448 (April 13, 1966); *Lynn Electric Company*, 40 S.E.C. 828, 833 fn. 9 (1961); *New Orleans Public Service*, 40 S.E.C. 887 (1961).

[8] The adjusted contract price would represent 183% of the underlying book value of the shares at December 31, 1972.

[9] By order, dated November 23, 1971, we granted NEES an exemption from the competitive bidding requirements of Rule 50. Holding Company Act Release No. 17371.

pressions of interest, either for the separate purchase of Lawrence or together with its other remaining gas properties, by individual letters and by newspaper advertisements. NEES conducted exploratory discussions with those who expressed an interest in Lawrence, and at various times sent additional information to them. Throughout the prebidding period NEES provided the same basic information to all who continued to have a serious interest in the acquisition of Lawrence. NEES received sealed bids for Lawrence at the same time and it reviewed them at the same time. These procedures afforded a fair opportunity for all persons seriously interested to make offers and for NEES to secure the maximum price reasonably obtainable. We conclude that NEES maintained competitive conditions in offering to sell Lawrence and in choosing Springfield as the successful bidder.

The liquidation of Mass Gas and the transfer of its assets and liabilities to NEES will be recorded at the values carried on the books of Mass Gas. NEES proposes to record the sale of the common stock of Lawrence by (1) a debit to its cash account in the amount of the sales price; (2) a credit to its investment account in the amount of the book value of the shares sold and (3) a credit to dividend income in an amount equal to the undistributed income having accrued from the time the NEES system first acquired the Lawrence shares. An amount equal to cash in excess of the above credits will be credited to the earned surplus account representing the gain to NEES from the sale. Among other things, the order by the Massachusetts Department of Public Utilities approving the acquisition by Springfield requires it to segregate the excess of acquisition price over the book value of the Lawrence assets and to amortize that amount over the life of the associated property.

NEES and Mass Gas have requested that our order entered herein recite that each of the transactions, exchanges,

sales and investments proposed in the plan are necessary or appropriate to effectuate the provisions of Section 11(b)(1) of the Act, in accordance with the requirements of Sections 1081 through 1083 of the Internal Revenue Code of 1954, as amended. This request will be granted. No fees or commissions will be paid by NEES or Mass Gas in connection with the sale. Certain services, incident to the transactions, have been or will be performed by New England Power Service Company, the system service company, at cost. A post-effective amendment will be filed setting forth these costs.

We conclude that the proposed transactions satisfy the provisions of the Act and the rules thereunder. An appropriate order will issue.

By the Commission. (Chairman GARRETT, Commissioners LOOMIS, EVANS and SOMMER. Commissioner OWENS not participating.)

GEORGE A. FITZSIMMONS
Secretary

Release No. 18149/October 31, 1973

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS GAS SYSTEM
Westborough, Massachusetts

(54-248, 70-5275)

ORDER APPROVING PLAN FILED UNDER SECTION 11(e)

The Commission having issued its Findings and Opinion and Order dated March 19, 1964 (Holding Company Act Release No. 15035, 41 SEC 888), pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935 ("Act") requiring divestment by New England Electric System ("NEES") of all its interests, direct or indirect, in its gas-utility subsidiary companies, and having ordered therein under Section 11(b)(1) that NEES dispose of its interests in its gas properties:

NEES and Massachusetts Gas System ("Mass Gas") having filed a plan, as amended, pursuant to Section 11(e) of the Act, to effectuate compliance with the Section 11(b)(1) order by the proposed divestiture of Lawrence Gas Company ("Lawrence"); to retire the minority stock interest in Lawrence and to carry out the other proposals therein specified.

The Commission having considered the record and having this day issued its Memorandum Opinion, concluding therein that the plan, as amended, is necessary to effectuate the provisions of Section 11(b)(1) of the Act and is fair and equitable to the persons affected thereby; and that NEES maintained competitive conditions in the bidding and proposed sale of Lawrence to Springfield, as required under Section 12(d) of the Act;

NEES and Mass Gas having requested the Commission recite in its Order that the transactions proposed are nec-

essary or appropriate to the integration of the NEES holding company system in accordance with the provisions of Section 11(b) of the Act and with the requirements of Section 1081 through 1083 of the Internal Revenue Code of 1954, as amended:

It Is Ordered that the request for hearing of the Association of Massachusetts Consumers is hereby denied; and

It Is Further Ordered, pursuant to Section 11(e) and other provisions of the Act and Rules thereunder, that said plan, as amended be, and it hereby is, approved, effective forthwith; and

It Is Hereby Determined and Ordered that each of the transfers, sales, exchanges, expenditures and investments described in subparagraphs I and II below is necessary or appropriate to the integration or simplification of the holding-company system of which New England Electric System is a member, and to the effectuation of the provisions of Section 11(b) of the Act, and that each such transaction is hereby authorized, approved and directed; that the sale and transfer described in subparagraph I below is ordered to be consummated within 120 days from the date of this Order; and that the expenditures or investments described in subparagraph II below are ordered to be made within 24 months of such sale and transfer. The transactions to which this Order relates, the stocks which are to be transferred, sold and exchanged, and the expenditures or investments which are to be made, are specified and itemized as follows:

I. New England Electric System shall sell and transfer to Springfield Gas Light Company 170,002 shares of capital stock of par value of $10 per share of Lawrence Gas Company in exchange for cash in the amount of $6,608,000, plus or minus the net increase or decrease in the book value thereof between December 31, 1971, and the end of the calendar month next preceding such sale and transfer.

II. An amount equal to the amount of cash received by New England Electric System upon the sale and transfer of such shares of capital stock of Lawrence Gas Company, as hereinabove ordered, shall be expended or invested by New England Electric System in one or more of the following manners: for stock of, or as a contribution to the capital or as paid-in surplus of, one or more corporations which are at the time of such expenditure or investment electric utility subsidiaries of New England Electric System, including but not limited to the following:

Massachusetts Electric Company,
The Narragansett Electric Company,
Granite State Electric Company and
New England Power Company

or in repayment of short-term notes issued by New England Electric System evidencing indebtedness originally incurred by New England Electric System on November 15, 1972, in the principal amount of $30 million, which amount was invested in common stock of said New England Power Company.

It Is Further Ordered that jurisdiction be, and it hereby is, reserved to take such action or enter such further orders as may be appropriate to carry out the provisions of Section 11(b) and the plan approved herein, including, insofar as may be necesary, judicial enforcement of the provisions in the plan for the elimination of the minority interest in Lawrence.

By the Commission. (Chairman Garrett, Commissioners Loomis, Evans and Sommer. Commissioner Owens not participating.)

George A. Fitzsimmons
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Public Utility Holding Company Act of 1935

Rel. No. 18254/January 11, 1974

Admin. Proc. File No. 3-4053

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS GAS SYSTEM
Westborough, Massachusetts

(54-248)

(70-5275)

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER GRANTING LEAVE TO FILE PETITION OUT OF TIME AND DENYING PETITION FOR REHEARING

On October 31, 1973, we approved a plan of New England Electric System ("NEES"), a registered holding company, filed pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("Act"), and denied an application filed by the Association of Massachusetts Consumers, Inc. ("AMC") requesting a hearing on the plan and moving for consolidation of the proceeding on such plan with another NEES proceeding.[1] On December 4, 1973, AMC petitioned for rehearing with respect to our order. NEES opposes this petition but takes no position on AMC's motion for leave to file its petition out of time.[2]

The plan proposed that NEES sell its capital stock interest in the Lawrence Gas Company ("Lawrence"), a subsidiary company, to Springfield Gas Light Company

[1] Holding Company Act Release No. 18149 (October 31, 1973).

[2] Rule 21(a) of our Rules of Practice permits a petition for rehearing but a petition for rehearing is not preconditioned to appellate review of a Commission order under Section 24(a) of the Act.

("Springfield"), an exempt holding company under Rule 2 of the Act. The sale of Lawrence to Springfield was consummated on November 14, 1973, effective as of October 31, 1973, in accordance with the provisions of the plan, as amended.

Originally, Springfield contemplated acquiring Lawrence and merging it into either Springfield or Northhampton Gas Light Company, (renamed Bay State Gas Company ("Bay State")), a wholly-owned subsidiary company of Springfield. However, on advice of tax counsel Springfield rearranged the form of acquisition so that Springfield and Bay State were merged concurrently with the acquisition of Lawrence, leaving Bay State as the surviving company and Lawrence as its sole subsidiary. The acquisition of Lawrence, whether by Springfield or Bay State, is not subject to Sections 9(a) (2) and 10 of the Act. Bay State, the surviving company, is, like its predecessor, Springfield, an exempt holding company. Notice of the proposed sale of Lawrence, issued March 14, 1973, (Holding Company Act Release No. 17906) gave any interested person until April 9, 1973, to request in writing that a hearing be held. In accordance with Rule 23(e) the notice specified that any person requesting a hearing shall state the reason for such request and the issues of fact or law raised by the plan which he desires to controvert. On April 9, 1973, AMC filed a request for hearing, an application to intervene therein, and a motion to consolidate the Springfield proceeding with another case in which a hearing had already been granted.

The other proceeding with which AMC sought consolidation involved the proposed sale of three NEES gas utility subsidiary companies, Lynn Gas Company ("Lynn"), Mystic Valley Gas Company ("Mystic Valley") and North Shore Gas Company ("North Shore") and Massachusetts LNG, Inc., ("Mass. LNG"), a gas storage company, to Eastern Gas and Fuel Associates ("Eastern")

the parent of Boston Gas Company ("Boston Gas"). A concurrent purchase of the assets of these gas utility companies and of the stock of Mass. LNG by Boston Gas was to be effected so that a single gas utility company would survive. AMC and others had requested a hearing on this proposed sale to Eastern. AMC's request for a hearing set forth in detail the issues of fact and law which it desired to controvert as prescribed in our notice of the proposed sale and in Rule 23(c). AMC cited five issues supported by factual allegations on which it claimed a hearing would be warranted. We ordered a hearing on that sale. AMC was allowed limited participation at the hearing in accordance with our Rules of Practice, and its counsel participated from time to time in the proceeding which lasted over seven weeks. The hearing was terminated when AMC and others settled their controversy with Eastern and NEES and withdrew from the proceeding, as noted in our Memorandum Opinion and Order of October 25, 1973, approving the sale of the NEES subsidiary companies.[3]

Although on April 9, 1973, AMC also requested a hearing on the proposed sale of Lawrence to Springfield, it did not specify reasons warranting a hearing on that particular transaction or state the particular issues of law and fact it desired to controvert. Aside from a general contention that the two sales should be heard together, AMC stated only: "[W]e request you to hold a public hearing on this matter which is subject to many of the same objections we raised against the proposed sale of Lynn, North Shore and Mystic Valley to Boston Gas."[4]

---

[3] Holding Company Act Release No. 18133 (October 25, 1973).

[4] This request appears in a prior letter of AMC to the Administrative Law Judge, dated March 29, 1973, annexed to the application as Appendix B. The request for hearing on the Eastern sale referred to was annexed as Appendix A. The application of April 9, 1973, itself was directed primarily to identifying AMC and arguing for consolidation of the two proceedings.

On October 31, 1973, six days after authorizing the Eastern sale, we issued our Memorandum Opinion and Order which authorized the sale of Lawrence.[5] We denied AMC's request for a hearing because AMC had not presented any reasons to justify its request.

This deficiency is more than a matter of form. A hearing is not ordered as a matter of course nor are we required to grant it merely because it has been requested.[6] A hearing is a means of ascertaining the facts necessary to reach a decision on legal issues in the proceeding. If a request for a hearing fails to specify the issues of fact or law which it is desired to controvert and the reasons why evidence must be taken to resolve such controversies, no issue has been drawn to define the scope of such hearing. Accordingly, in accordance with our established practice, our notice in this proceeding expressly required such specification.[7] This procedure makes good administrative sense and at the very least serves to screen out requests for hearings on vague, unsubstantial or immaterial issues. Without it, a hearing may be futile or turned into a search for issues rather than an effective exploration of issues specifically identified and properly noticed.

AMC cannot expect us to determine for it which of the "many" reasons it had specified in opposition to the proposed sale to Eastern had some relevance to the proposed sale of Lawrence and to recast them into issues to be heard in the latter proceeding. Pleading by allusion is no substitute for the direct and explicit statement that we have required as this very case demonstrates. Even con-

---

[5] The price paid for NEES' stock interest was $6,638,000 or 183% of the book value. The minority stockholding of Lawrence will be paid the same price.

[6] See *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 762 (1973).

[7] Holding Company Act Release No. 17906 (March 14, 1973). *Cf.* Rule 23(e) and Rule 23(c).

strued with the utmost liberality, AMC's request would not justify a hearing on the Lawrence sale.

It is clear that many of the AMC objections to the Eastern acquisition could in no way be applicable to the proposed Springfield acquisition. AMC objected to the proposed merger of Lynn, Mystic Valley and North Shore into Boston Gas, Eastern's subsidiary, because of Eastern's substantial stock interest in Algonquin Gas Transmission Company, Boston's supplier of pipeline natural gas. Springfield, on the other hand, receives its pipeline gas from Tennessee Gas Transmission Company with which it has no corporate affiliation.

Another AMC objection dealt with the alleged increment of market control by Boston Gas if it were allowed to merge with the three former NEES companies. Geographically, the utility properties to be acquired by Boston adjoined its existing territory and shared with it gas service to metropolitan Boston. In contrast, Lawrence and Springfield serve distinct areas of Massachusetts. AMC cited statistics showing an increase in Boston Gas customers, after the merger, from 338,680 on January 1, 1972, or 31.68 percent of all Massachusetts private utility gas customers, to 515,295 customers, or 48.20 percent. No statistics were cited by AMC to show the respective market share or number of customers for Springfield, Bay State and Lawrence. However, the record shows that as of January 1, 1972, Springfield had 67,849 customers, Bay State had 8,000 customers and Lawrence had 32,791 customers. Obviously, the aggregate market share for Springfield and Bay State, assuming a combination with Lawrence, is in no way comparable to that of Boston Gas.

In its petition for rehearing AMC seeks to restate its objections to the Springfield sale. It is now alleged, for the first time, that, in terms of market concentration,

Springfield should not be considered as a single and isolated utility company. Springfield is related to a group of other utilities through common executive personnel,[8] and it is now urged that the effect of the Lawrence sale to Springfield should be considered in this larger administrative context.

The statutory relevance of these new allegations is by no means clear, but there is no need to pursue this issue now. For present purposes it is sufficient to note that these allegations were not even remotely suggested by AMC's original objections. In fairness to all concerned we do not deem it proper to reconsider the Lawrence sale, which has been consummated pursuant to our order, on the basis of a novel issue of doubtful merit or relevance that AMC has now presented to us for the first time.[9]

We could and did read AMC's original request for hearing as raising an issue as to the maintenance of competitive conditions in the efforts by NEES to sell these companies. The bidding itself, the evaluation of the bids and

---

[8] For many years, Springfield Gas Company, Fitchburg Gas and Electric Light Company, Brockton-Taunton Gas Company (Massachusetts) Concord Electric Company and Exeter and Hampton Electric Company (New Hampshire) and Orange and Rockland Utilities, Inc. (New York), an exempt holding company with subsidiaries in adjacent portions of New Jersey and Pennsylvania, have shared executive offices and certain other administrative services.

[9] AMC's statement that as a result of the sale Lawrence is transferred from one combination gas and electric utility holding company to another is unfounded. Springfield is not part of a statutory holding-company system, and none of the companies with which it has any administrative relationships conduct an electric utility business in Lawrence. The sale of Lawrence effectively separates its gas business from the electric service that NEES provides in that area.

the preparatory discussions NEES conducted with all prospective bidders involved Lawrence as well as Lynn, Mystic Valley and North Shore. It had to because NEES had offered, as one bidding alternative, the sale of all four companies together. Because this issue was necessarily identical on both sales, we deferred action on the Lawrence sale until a full exploration of the bidding procedure was completed in the Eastern hearing. If any irregularities were to be uncovered, AMC's counsel had ample opportunity to uncover them in the seven weeks of hearings on the Eastern acquisition. Having found after a full hearing that the procedures adopted by NEES maintained competitive conditions in sufficient measure to satisfy Section 12(d) and Rule 44,[10] we saw no need for another hearing for the purpose of again reviewing the same subject.

From AMC's original request and from its present motion for rehearing, it appears that AMC's main objective was to consolidate for hearing the two proceedings. They dealt with the sale of different properties to different purchasers at different prices, and, except for the question of the bidding procedure, the governing facts were not interrelated. We adhere to the original determination that consolidation would have encumbered each proceeding and purchaser with questions and proof foreign to the expeditious disposition of the particular transaction involved.

AMC also takes exception to our determination that an acquisition of the stock of a utility company with a concurrent liquidation or merger of the company acquired should be considered, under the Act, as an acquisition of assets rather than as an acquisition of utility securities. It requires no argument to show that this interpretation correctly reflects the substance of the transaction being

---

[10] Holding Company Act Release No. 18133 (October 25, 1973).

examined. The acquisition of the stock is simply a method of transferring title to the assets. We have not been presented with any persuasive reasons to change our long standing interpretation of Section 9(a) (2).[11]

It appears that there was an inadvertent failure to serve AMC with the Order of October 31, 1973, authorizing the Lawrence sale. The motion for leave to file the petition for rehearing out of time is granted.

For the reasons set forth above, the petition for rehearing is denied.

By the Commission.

/s/ GEORGE A. FITZSIMMONS
George A. Fitzsimmons
Secretary

---

[11] *Crescent Public Service Company*, 22 S.E.C. 426, 432 (1946). The same rule is well established in tax law. *Cf. Ashland Oil & Refining Corp.* v. *Commissioner*, 99 F.2d 588 (C.A. 6, 1936), *cert. den.*, 306 U.S. 661; *Kanawaha Gas & Utilities Co.* v. *Commissioner*, 214 F. 2d 685, 691 (C.A. 5, 1954).

APPENDIX B

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935*

TITLE I—CONTROL OF PUBLIC UTILITY HOLDING COMPANIES

Necessity for Control of Holding Companies

SEC. 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors on the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of elec-

---

* Approved August 26, 1935, 49 Stat. 803, 15 U.S.C. 79a et seq. Only Title I of this Act is printed herewith. Title II containing the amendments of the Federal Water Power Act is administered by the Federal Power Commission. (Note. See p. 29.)

tric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utilty companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and op-

eration or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

Definitions

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * * * * * * *

(11) "Affiliate" of a specified company means—

(A) any person that directly or indirectly owns, controls, or holds with power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

* * * * * * * * * *

Acquisition of Securities and Utility Assets and Other Interests

SEC. 9. (a) Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate, under clause (A) of paragraph (11) of subsection (a) of section 2, of such company and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.

(b) Subsection (a) shall not apply to—

(1) the acquisition by a public-utility company of utility assets the acquisition of which has been expressly authorized by a State commission; or

(2) the acquisition by a public-utility company of securities of a subsidiary public-utility company thereof, provided that both such public-utility companies and all other public-utility companies in the same holding-company system are organized in the same State, that the business of each such company in such system is substantially confined to such State, and that the acquisition of such securities has been expressly authorized by the State commission of such State.

(c) Subsection (a) shall not apply to the acquisition by a registered holding company, or a subsidiary company thereof, of—

(1) securities of, or securities the principal or interest of which is guaranteed by, the United States, a State, or political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing;

(2) such other readily marketable securities, within the limitation of such amounts, as the Commission may by rules and regulations prescribe as appropriate for investment of current funds and as not detrimental to the public interest or the interest of investors or consumers; or

(3) such commercial paper and other securities, within such limitations, as the Commission may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers.

Approval of Acquisition of Securities and Utility Assets and Other Interests

SEC. 10. (a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interest in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the offices or directorships held, and securities owned, held, or controlled, by them in other companies,

(D) the bonus, profit-sharing and voting-trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled, directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof, or its reations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may

be required under section 5 from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any othe interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the ap-

plicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Notwithstanding the provisions of subsection (b), the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 8 or is detrimental to the carrying out of the provisions of section 11; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets,

as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 11.

Simplification of Holding-Company Systems

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commis-

sion shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantage of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such hold-

ing company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as

sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall

approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commision as trustee or receiver without notifying the Commision and giving it an opportunity to be heard before making any such otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such

rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding shall be subject to approval by the Commission.

(g) It shall be unlawful for any person to solicit or permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan of a registered holding company or any subsidiary company thereof under this section, or otherwise, or in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof, unless—

(1) the plan has been proposed by the Commission, or the plan and such information regarding it and its sponsors as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers has been submitted to the Commission by a person having a bona fide interest (as defined by the rules and regulations of the Commission) in such reorganization;

(2) each such solicitation is accompanied or preceded by a copy of a report on the plan which shall be made by the Commission after an opportunity for a hearing on the plan and other plans submitted to it, or by an abstract of such report made or approved by the Commission; and

(3) each such solicitation is made not in contravention of such rules and regulations or orders as the

Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

Nothing in this subsection or the rules and regulations thereunder shall prevent any person from appearing before the Commission or any court through an attorney or proxy.

APPENDIX C

CHAIRMAN

PAUL G. GITLIN
EXECUTIVE SECRETARY

The Commonwealth of Massachusetts
Consumers' Council

Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston 02202

October 1, 1975

The following resolution was adopted by unanimous vote of the Massachusetts Consumers' Council at its regularly scheduled monthly meeting of September 11, 1975.

Resolved:

That the Massachusetts Consumers' Council urge the Association of Massachusetts Consumers to continue and pursue its challenge to the merger of Lawrence Gas with Springfield Gas (now Bay State Gas) and explore all avenues of appeal, including the Supreme Court, in order to force resolution of the public interest considerations involved in the creation of bigger and bigger utility combinations in Massachusetts.

A true copy attested by: Paul G. Gitlin

Paul G. Gitlin, Executive Secretary

NOTARY PUBLIC: Barbara C. Moran

MY COMMISSION EXPIRES
MAY 28, 1982

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; WILLIAM L. SPRINGER, and JOHN H. HOLLOMAN III.

Docket No. ID-1316
GEORGE A. CARLSON

Docket No. ID-1643
THOMAS W. SHERMAN

Docket No. ID-1599
JAMES F. SMITH

Docket No. ID-1095
CHARLES H. TENNEY II

Order To Show Cause

(Issued September 15, 1975)

By order issued October 24, 1957, George A. Carlson (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Assistant Treasurer—Fitchburg Gas & Electric Light Company

Assistant Treasurer—Rockland Light & Power Company

Assistant Treasurer—Rockland Electric Company

Assistant Treasurer—Pike County Light & Power Company

By order issued November 26, 1971, Thomas W. Sherman (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Assistant Treasurer—Orange & Rockland Utilities, Inc.

Assistant Treasurer—Rockland Electric Company

Assistant Treasurer—Pike County Light & Power Company

Assistant Treasurer—Fitchburg Gas & Electric Light Company

By order issued August 2, 1972, James F. Smith (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Director, Vice President, Treasurer and Assistant Secretary—Orange & Rockland Utilities, Inc.

Director, Vice President, Treasurer and Assistant Secretary—Rockland Electric Company

Director, Vice President, Treasurer and Assistant Secretary—Pike County Light & Power Company

Director and Vice President—Fitchburg Gas and Electric Light Company

By order issued February 18, 1964, Charles H. Tenney II (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Chairman of the Board of Directors, Director—Orange & Rockland Utilities, Inc.

Chairman of the Board of Directors, Director—Pike County Light & Power Company

Chairman of the Board of Directors, Director—Rockland Electric Company

Chairman of the Board of Directors, Director—Fitchburg Gas & Electric Light Company

In each of the aforementioned orders, the Commission reserved the right to require Applicants to make further showings that neither public nor private interests would be adversely affected by the continued holding of the above-named positions.

Persons are prohibited by Section 305(b) of the Federal Power Act from holding interlocking board of directors and officers positions in two or more utilities unless they demonstrate that such holding is not adverse to public or private interests. In the past, the Commission has generally authorized the holding of interlocking positions between companies which are under common ownership, which have adjoining territories, and which operate as a single integrated utility system, as in the case of utilities within the Orange & Rockland Group.[1] However, the Applicants hold positions which interlock both within the Orange & Rockland Group and with companies outside[2] the Orange and Rockland Group. The Commission has not granted authorization for persons to hold interlocking positions which extend outside a group of utilities which operate as an integrated utility system, except in the case of the applicants all of whom are associated with the so called "Tenney Group"[3].

Based upon a Staff investigation of the "Tenney Group" arrangement, the Commission has determined that the present holding of interlocking positions which extend to utilities outside the Orange & Rockland Group may be adverse to public or private interests insofar as Orange & Rockland and subsidiaries are concerned because:

---

[1] Utilities involved in the Orange & Rockland Group arrangement are: Orange & Rockland Utilities, Inc., and its subsidiaries, Rockland Electric Company, and Pike County Light & Power Company. These companies are subject to Commission jurisdiction.

[2] Tenney Group companies outside the Orange & Rockland Group: Fitchburg Gas & Electric Company (subject to Commission jurisdiction), Brockton Taunton Gas Company, Concord Electric Company, Exeter and Hampton Electric Company, and Bay State Gas Company.

[3] "Tenney Group": Provides management and other services to the group of utilities listed in footnotes 1 & 2, notwithstanding the fact that the number of shares of voting stock owned directly or indirectly in each company is relatively small.

(1) Orange & Rockland Utilities and subsidiaries no longer should be considered a small utility and the complexity of its operation warrants full time executive management by its officers and directors;

(2) Support of offices in Boston by Orange & Rockland Utilities and subsidiaries as an integral part of sharing the talent of certain key executives appears no longer to be justified by any reciprocal benefits to Orange & Rockland and its subsidiaries;

(3) Orange & Rockland Utilities and subsidiaries while sharing its top executives with other utilities encountered serious financial problems much earlier than the onset of financial problems in the electric utility industry and these problems were attributable in part to deficiencies which relate to:

(a) management of reported earnings beginning as early as 1968 through accounting changes while avoiding requests for rate increases;

(b) actions related to arrangements for construction and operation of the Bowline Generating Station on a joint ownership basis with Consolidated Edison Company; and

(c) administration of joint-use of pole arrangements with telephone utilities and cable television operators.

Notwithstanding the size and complexity of the operations of Orange & Rockland and subsidiaries, the "Tenney Group" arrangement calls for four persons in executive management positions to be located in Boston apart from Orange & Rockland's main office in Spring Valley, New York and to devote only part of their time to the affairs of Orange & Rockland and subsidiaries.

In addition, Charles H. Tenney II as Chairman of the Board of Directors for Orange & Rockland Group Companies and other Companies participating in the "Tenney

Group" arrangement received in 1973 a total salary of $158,417.00, of which 42% or $65,750.00 was borne by Orange & Rockland Utilities and subsidiaries. For the year 1973 Orange & Rockland Utilities and subsidiaries had operating revenues totaling approximately $123.4 million. Accounting to a report published by Commonwealth Management Consultants,[4] the median salary for the highest paid top executive of a company having revenues in the range of $123.4 million was between $70,000 and $80,000, or about one-half of the effective annual rate paid Charles H. Tenney II by Orange & Rockland and subsidiaries. Absent a showing of special circumstances, there would appear to be no justification for Applicant to receive a salary substantially in excess of the levels paid other utility executives reported in the survey.

The Commission finds:

In view of the foregoing, it is necessary and appropriate for the purpose of administering the Federal Power Act that the Applicants show cause, if any there be, why the Commission should not terminate the present authority to hold the interlocking positions referred to above.

The Commission orders:

(A) George A. Carlson, ID-1316, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorization to hold the following interlocking positions:

Assistant Treasurer—Fitchburg Gas & Electric Light Company

Assistant Treasurer—Rockland Light & Power Company
Assistant Treasurer—Rockland Electric Company

---

[4] The published results of a study of executive salaries by Commonwealth Management Consultants for the year 1971. The survey on which the results were based included executives in 77 electric, gas, combination and pipeline utility companies.

Assistant Treasurer—Pike County Light & Power Company

would be adverse to public or private interests and should be terminated.

(B) Thomas W. Sherman, ID-1643, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorizations to hold the following interlocking positions.

Assistant Treasurer—Orange & Rockland Utilities, Inc.

Assistant Treasurer—Rockland Electric Company

Assistant Treasurer—Pike County Light & Power Company

Assistant Treasurer—Fitchburg Gas & Electric Light Company

would be adverse to public or private interests and should be terminated.

(C) James F. Smith, ID-1599, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorization to hold the following interlocking positions:

Director, Vice President, Treasurer and Assistant Secretary—Orange & Rockland Utilities, Inc.

Director, Vice President, Treasurer and Assistant Secretary—Rockland Electric Company

Director, Vice President, Treasurer and Assistant Secretary—Pike County Light & Power Company

Director and Vice President—Fitchburg Gas & Electric Light Company

would be adverse to public or private interests and should be terminated.

(D) Charles H. Tenney II, ID-1095, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorization to hold the following interlocking positions:

Chairman of the Board of Directors, Director—Orange & Rockland Utilities, Inc.

Chairman of the Board of Directors, Director—Pike County Light & Power Company

Chairman of the Board of Directors, Director—Rockland Electric Company

Chairman of the Board of Directors, Director—Fitchburg Gas & Electric Light Company

would be adverse to public or private interests and should be terminated.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.